IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1480 OF 1986

1. Col. Surinder Kapur, M.V.C.(Retd.), of Bombay, Indian Inhabitant, residing at "Meera", East Avenue, Santacruz (West), Bombay - 400 054.

2. Shri Sandip kapur of Bombay, Indian Inhabitant, residing at "Meera" East Avenue, Santacruz(West), Bombay - 400 054.

AND

3. Smt. Renu Kapur of Bombay, Indian Inhabitant, residing at 29, Niharika Bungalows, Opp. Himatlal Park, Ambawadi, Ahmedabad - 380 015. } Plaintiffs.

V/s.

1. M/s. Systems Communication, a Partnership Firm, registered under the Indian Partnership Act, 1932, and having its place of Business at 20-A, Tulsiani Chambers, Nariman Point, Bombay - 400 021.

2. Shri Shyam Dwarkasingh Chhabria of Bombay, Indian Inhabitant, Residing at 137, Maker Tower ‘B’ Cuffe Parade, Bombay - 400 005.

3. Shri Deepak Dwarkasingh Chhabria of Bombay, Indian Inhabitant, Residing at 131, Maker Tower‘B’, Cuffe Parade, Bombay - 400 005.

4. The Court Receiver, High Court, Bombay, having his office at Bank of India Building, M.G.Road, Bombay - 400 023.

5. Abud-Dhabi Commercial Bank Ltd., a Banking Company, incorporated under the laws in force in the United Arab Emirates, and having its Registered Office in Abu-Dhabi and a Branch Office at Rehmat Manzil, 75-B, Veer Nariman Road, Bombay - 400 020.

6. ICICI Bank Ltd. }
Registered office at Landmark, }
Race Course Circle, }
Vadodara - 390 007. }
}
AND }
}
7. The State Bank of Mysore Ltd., }
a Banking Company, incorporated }
under the Companies Act, 1956 }
and having its Registered Office }
at Mysore, Karnataka, and the }
Main Branch Office at 'Mittal }
Court', 'C' Wing, 224, Nariman }
Point, Bombay - 400 021. } Defendants.

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Mr. S.P. Dalal i/b. Dalal & Co. for the Plaintiffs.
Ms. Mamta Sadh with Ms. Sarika Mehra i/b. LJ Law for Defendant Nos. 1 to 3.
Mr. Rahul Kapoor i/b. Kanga & Co. for Defendant No.5.

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CORAM : A.S. OKA, J.

DATE : 23rd AUGUST 2007.

ORAL JUDGMENT :

. The subject matter of the suit is office premises No.6-B, on the 2nd floor of the building known as "Arcadia", situated at Plot No. 195, Nariman Point, Bombay 400 021.

2. The first prayer in the suit is for declaration that all mortgages, charges, securities, arrangements or any other interest purportedly created or entered into by the Defendant Nos.1,2 and 3 or any of them, in favour of a third party in respect of the suit premises are null and void, invalid, illegal,

unenforceable in law and not binding on the Plaintiffs. A declaration is also claimed that purported equitable mortgages alleged to have been created by Defendant Nos.1,2 and 3 or any of them in favour of the 5th and 6th Defendants in respect of the suit premises are null and void, invalid, illegal, unenforceable at law and not binding on the Plaintiffs. Various other declarations are prayed by the Plaintiffs. They have also prayed for a decree of possession of the suit premises. A prayer is also made directing the Defendants to pay arrears of interest/compensation for the period from 1st June 1983 till 31st July 1984 together with interest thereon. A prayer is also made against the 1st, 2nd and 3rd Defendants for payment of arrears of outgoings in respect of the suit premises with interest. A prayer is made for a direction against the 1st to 3rd Defendants for payment of mesne profits at the rate of 11,000/- per month from the date of the filing of the suit till the date on which the vacant possession of the suit premises is handed over to the Plaintiffs.

3. It will be necessary to refer to the case made out by the parties in their pleadings. The Plaintiffs claim to be the owners of the suit premises. According to the case of the Plaintiffs, by an agreement in writing dated 26th November 1979 executed by them in favour of the 1st Defendant, they

agreed to sell the suit premises to the 1st to 3rd Defendants for consideration of Rs.5,17, 500/-. The 1st to 3rd Defendants paid a sum of Rs.48,000/- to the Plaintiffs at the time of execution of the said agreement. According to the case of the Plaintiffs, it was agreed that the balance consideration of Rs.4,69,500/- was to be paid on or before 1st December 1984. It is alleged that the said time limit was the essence of the contract. It is stated that as per the agreement the possession of the suit premises was handed over to the 1st to 3rd Defendants. The suit premises was to be transferred in the name of the purchasers after payment of the entire balance consideration on or before 1st December 1984. The agreement further provided that if the 1st to 3rd Defendants fail to pay the balance consideration within the stipulated time, the agreement shall stand cancelled and the purchasers under the agreement shall hand over vacant and peaceful possession of the suit premises to the Plaintiffs and against delivery of possession, the Plaintiffs will refund the amount of Rs.48,000/-.

4. It is stated that it was agreed between the parties that pending the payment of balance consideration, the purchasers under the agreement will pay to the Plaintiffs a sum of Rs.4,000/- per month being the compensation on the said consideration on or

before 10th day of every month in advance commencing from 1st December 1979. It was also agreed that till the payment of balance consideration by the 1st to 3rd Defendants, the said Defendants shall be liable to pay all the Municipal Taxes, maintenance charges, lease rent and all other outgoings payable in respect of the suit premises to the Society/builders regularly and punctually. The agreement further provided that in the event the purchasers under the agreement committing default in payment of any two instalments of Rs.4,000/- per month, the Plaintiffs shall be entitled to terminate the agreement after giving 60 days notice in writing to the purchasers under the agreement. It is further provided that on such termination being made, the purchasers under the agreement shall be liable to hand over vacant and peaceful possession of the suit premises to the Plaintiffs and in such event the Plaintiffs shall refund the earnest money of Rs.48,000/-.

5. It is alleged in the plaint that in July 1984 the Plaintiffs visited the suit premises. At that time the Plaintiffs discovered that the suit premises were locked and on its door there was a board stating that the suit premises were under a pledge in favour of the 7th Defendant. According to the case of the Plaintiffs it was learnt that the 1st to 3rd Defendants had created a mortgage in respect of the

suit premises in favour of the 5th and 6th Defendants and the said two Defendants had filed suits for recovery of their alleged dues and for enforcement of the securities in their favour. The Plaintiffs learnt that the 2nd and 3rd Defendants had obtained cash credit facility from the 7th Defendant against the pledge of certain goods allegedly belonging to them and allegedly stored in the suit premises. The Plaintiffs learnt that the said two Defendants allowed the 7th Defendant a lock and key arrangement in respect of the suit premises and thus, the 7th Defendant had put up a board as aforesaid that the suit premises were under its lock and key.

6. The Plaintiffs by their Advocate's notice dated 3rd August 1984 addressed to the 1st to 3rd Defendants terminated the suit agreement dated 26th November 1979 and called upon the said Defendants to forthwith vacate and hand over quiet and peaceful possession of the suit premises to the Plaintiffs. The said Defendants were also called upon to pay to the Plaintiffs a sum of Rs.1,38,596.65 towards the arrears of monthly compensation/interest payable on the balance consideration and arrears of outgoings in respect of the suit premises upto the period ending 31st July 1984.

7. The 5th and 6th Defendants had filed Suit Nos. 2286 of 1983 and 2626 of 1983 respectively against the 1st to 3rd Defendants. On a Notice of Motion taken out by the 5th Defendant in Suit No. 2286 of 1983, by the order dated 5th March 1984 the 4th Defendant herein (the Court Receiver, High Court, Bombay) was appointed as the Receiver in respect of the suit premises. Even in the suit filed by the 6th Defendant, by an order dated 9th July 1984, the 4th Defendant was appointed as the Receiver of the suit premises. The 7th Defendant also filed a Summary suit No.2483 of 1983 and obtained a money decree against the 2nd and 3rd Defendants.

8. The order of learned Single Judge of this Court passed in Suit No.2286 of 1983 appointing the Court Receiver was confirmed by the Division Bench of this Court and the said order was affirmed by the Apex Court with a modification. It was directed that the Court Receiver shall not dispossess the 1st to 3rd Defendants but will allow them to continue in possession as the agents. The 1st to 3rd Defendants were directed not to create any third party interests in respect of the suit premises without permission of the Court.

9. It must be stated that the suits filed by the 5th and 6th Defendants ended in compromise. By order

dated 22nd June 1999 passed by this Court in Notice of Motion No.1585 of 1998 taken out in the present suit, the 4th Defendant was appointed as the Receiver in respect of the suit premises. By the said order dated 22nd June 1999, this Court made the said Notice of Motion absolute in terms of prayer clauses (b), (c), (d) and (e). This Court directed the 1st to 3rd Defendants to pay/deposit with the 4th Defendant - Court Receiver the arrears in respect of the suit premises pursuant to clause 10 of the agreement dated 26th November 1979 with effect from 27th April 1984. This Court directed the 1st to 3rd Defendants to make payment as computed in Receiver's Report dated 27th February 1998 upto 1st January 1998. They were also directed to pay the arrears from 1st January 1998 till the date of passing order. The amounts were directed to be deposited within the time granted in the said order.

10. The suit was contested by the 1st to 3rd Defendants by filing their written statement. It was contended by the 1st to 3rd Defendants that they were put in possession of the suit premises in part performance of the suit agreement dated 26th November 1979. It is stated that the said Defendants were always ready and willing to carry out their part of the obligations under the suit agreement. The said Defendants alleged that though they were ready and

willing to carry out their part of the obligations under the suit agreement, the Plaintiffs insisted that the balance consideration need not be paid but the said Defendants should continue to pay a sum of Rs.4,000/- per month. It is stated that on account of the insistence on the part of the Plaintiffs, the said Defendants paid to the Plaintiffs a sum of Rs.4,000/- per month almost for a period of 4 years. It is contended that since the said Defendants realised the device of the Plaintiff to make money at the cost of the said Defendants, on or about May 1983 the said Defendants offered to pay the entire balance consideration to the Plaintiffs. It is stated that the Plaintiff refused to receive a balance consideration and therefore the said Defendants had no option but to stop making payment of sum of Rs.4,000/- from June 1983. It is stated that the said Defendants were required to face multiple litigations and therefore, they could not write any letter offering balance consideration to the Plaintiffs. The said Defendants denied that they had no right, title or interest in respect of the suit premises. The said Defendants denied that the Plaintiffs were entitled to recover possession of the suit premises.

11. The 5th Defendant filed written statement. The 5th Defendant pointed out that a consent decree was passed in Suit No.2286 of 1983 filed by the 5th

Defendant. The 6th Defendant also filed written statement. The 6th Defendant relied upon the decree passed by this Court in the year 1988 in Suit No.2626 of 1983 filed by the said Defendants in this Court. The said Defendants contended that an equitable mortgage was created by the 1st to 3rd Defendants in respect of the suit premises in favour of the said Defendants.

12. On 2nd April 2002, this Court framed the issues. The said issues read thus :-

(1) Do the Plaintiffs prove that the Plaintiffs have validly terminated Agreement of Sale dated 26th November 1979 for defaults and breaches committed by the Defendants 1 to 3 as per the Exhibit 'C' to the plaint ?

(2) Do the Plaintiffs prove that the appointment of the Court Receiver in Suit No.2626 of 1983 at the instance of 5th, 6th and 7th Defendants was wrongful and illegal ?

(3) Do Plaintiffs prove that the Defendant Nos.5 & 6 were and are deemed to have been aware that the Defendant Nos.1 to 3 or any of them have no rights, titles and interests in the suit premises ?

(4) Do the Plaintiffs prove that the purported possession of the suit premises by Defendant Nos.1 to 3 or any of them to 5th Defendant and/or 7th Defendant is illegal, wrongful and consequently the lock and key purported to have been put on the suit premises by them was also wrongful and illegal as alleged in paragraph No.9 of the plaint ?

(5) Do the Plaintiffs prove that the Plaintiffs are entitled to forfeit earnest money Rs.48,000/- (Rupees forty eight thousand only) paid by the Defendant Nos.1 to 3 ?

(6) Do the Plaintiffs prove that the Plaintiffs are entitled to recover from the Defendants or such of the Defendants the possession of the suit premises ?

(7) Do the Plaintiffs prove that the Defendant Nos.1 to 3 are liable to indemnify them against all claims and demands in respect of the outgoing of the suit premises and to procure all necessary discharge ?

(8) Do the Plaintiffs prove that the Plaintiffs are entitled compensation and/or mesne profit ?

(9) Whether the suit is barred by the Law of Limitation ?

(10) Do the Defendant Nos.1 to 3 prove that suit is bad for non-joinder of the parties as alleged in para 1 of the written statement ?

(11) Do the Defendant Nos. 1 to 3 prove that suit is bad for mis-joinder of parties ?

(12) In absence of Notice under Section 80 of Civil Procedure Code the suit is not maintainable and liable to be dismissed with costs ?

(13) Whether the suit is bad and not maintainable for want of notice under Section 80 of the Civil Procedure Code ?

(14) Do the Defendant Nos.1 to 3 prove that the Plaintiffs insisted them not to pay balance consideration but to pay sum of Rs.,4000/- (Rupees four thousand only) per month ?

(15) Whether the Defendant No.6 proves that the suit false, frivolous and vexatious as

alleged in paragraph 1 of the written statement ?

(16) Do the Plaintiffs prove that the mortgage/charge created in favour of Defendant No.6 by Defendant Nos. 1 to 3 in respect of the suit property is null and void or illegal, invalid or unenforceable or not binding on the Plaintiffs ?

(17) Whether the suit is maintainable in respect of the suit premises in the absence of a challenge to the decree dated 2.9.1988 passed by the Court in Suit No.2626 of 1983 filed by Defendant No.6 ?

(18) Do the Defendant Nos. 1 to 3 prove that they were ready and willing to perform their obligations under the suit agreement dated 26.11.1979 as claimed in paragraphs 5 and 11 of the written statement ?

(19) Do the Defendant Nos. 1 to 3 prove that they offered to pay to the Plaintiffs and the Plaintiffs refused to receive the balance consideration as alleged in paragraph 9 of the written statement ?

(20) Do the Plaintiffs prove that they sent/caused to be sent the notice dated 3.8.1984 to Defendant Nos. 1 to 3 as stated in paragraph 8 of the plaint ?

(21) Do the Defendant Nos. 5 & 6 prove that valid and subsisting equitable mortgage has been created by Defendant Nos. 1 to 3 on the suit property in their favour ?

(22) What order ?

13. The Plaintiffs examined the 1st Defendant by filing his affidavit in lieu of examination in chief. The Plaintiffs also examined one Shri Lalitkumar Gupta as their second witness. The 1st to 3rd Defendants examined the Second Defendant as their witness by filing his affidavit in lieu of examination in chief. None of the other Defendants have led any evidence. The Plaintiffs have placed various documents on record in respect of their claim.

14. The learned Counsel appearing for the 1st to 3rd Defendants has taken me through the relevant portion of the pleadings and notes of evidence. The learned Counsel for the said Defendants invited my attention to the Issues settled by this Court. She

pointed out that Issue Nos.1,5 and 20 relate to the alleged termination of the suit agreement by the Plaintiffs. She pointed out that Issue Nos.4,6,8,14,18 and 19 relate to the possession of the suit premises and Issue Nos. 3, 16 and 21 are on the legality and validity of the alleged mortgage. She submitted that in so far as Issue Nos.2 and 7 are concerned, the burden is on the Plaintiff to prove the said issues. She pointed out that in so far as Issue Nos.5,9,10,11 and 12 are concerned, the burden was on the 1st to 3rd Defendants to prove. She pointed out that Issue Nos.16 and 17 relate to the 6th Defendants.

15. The learned Counsel for the 1st to 3rd Defendants submitted that the said Defendants are protected by Section 53-A of the Transfer of Properties Act, 1882 (hereinafter referred to as the said Act of 1882). She invited my attention to averments made in the Written Statement as well as the statement made in affidavit in lieu of examination in chief of the 2nd Defendant. She submitted that the specific case of the Defendants is that though they were ready and willing to pay the balance consideration within the time stipulated in the said agreement, the Plaintiffs insisted that the said amount need not be paid and the said Defendants should continue to pay sum of Rs.4,000/- per month. She invited my attention to assertion made in paragraph 7

of the affidavit in lieu of examination in chief of the 2nd Defendant. She submitted that it is clearly stated by the 2nd Defendant that the Plaintiffs were not traceable and could not be contacted in the year 1983. She submitted that in so far as the said assertion is concerned, there is no cross examination of the said witness made by the Advocate for the Plaintiffs. She pointed out that there is no cross examination made on the readiness and willingness of the 1st to 3rd Defendants to comply with their obligations under the suit agreement.

16. She submitted that the 1st to 3rd Defendants were admittedly put in possession of the suit premises in part performance of the suit agreement and the said Defendants have taken steps in furtherance of the said agreement by paying sum of Rs.48,000/- as earnest money and by paying sum of Rs.4,000/- per month to the Plaintiffs till May 1983. She submitted that as the readiness and willingness has been pleaded and proved by the 1st to 3rd Defendants, the protection under Section 53-A of the said Act of 1882 is certainly available to the said Defendants. She invited my attention to orders dated 21st May 1998 and 15th February 2005 passed by this Court and she submitted that compliance has been made by the 1st to 3rd Defendants by making payment of outgoings and other amounts in respect of the suit premises to the 4th

Defendant - Court Receiver. She submitted that the alleged termination of the suit agreement purportedly made by the Plaintiffs is not legal and proper. She contended that the termination is merely on the failure to pay the balance consideration. She pointed out that as the Plaintiffs themselves were not interested in taking balance consideration from the 1st to 3rd Defendants, there could not have been termination on the ground of non-payment of sum of Rs.4,000/- per month by the 1st to 3rd Defendants. She pointed out that if the Plaintiffs had accepted the balance consideration from the 1st to 3rd Defendants within the time provided in the suit agreement, there was no question of the said Defendants paying a sum of Rs.4,000/- per month. In fact for a period of 4 years, the Plaintiffs have taken sum of Rs.4,000/- per month from the said Defendants. She submitted that as the 1st to 3rd Defendants are protected by doctrine of part performance and as the alleged termination of the suit agreement is not legal and valid, the Plaintiffs are not entitled to any relief. She relied upon various decisions of this Court, Apex Court and other High Courts. A reference to which is made in later part of this judgment.

17. The learned Counsel for the Plaintiffs submitted that there was a clear default made by the

1st to 3rd Defendants in payment of sum of Rs.4,000/- per month. He invited my attention to orders dated 23rd October 1997 and 5th December 1997 passed by this Court. It is pointed out that after the 1st and 3rd Defendants were appointed as the agents of the Court Receiver, they have committed defaults and they have not paid the dues or the charges of the Receiver. He invited my attention to various clauses in the suit agreement. He submitted that there is already a settlement between the Plaintiffs and the 5th Defendant. He submitted that in any event no evidence has led by the 5th and 6th Defendants to show that there is a valid mortgage created in their favour by the 1st to 3rd Defendants. He, therefore, submitted that the Plaintiffs have proved their case.

18. The learned Counsel for the 1st to 3rd Defendants pointed out that the prayer made in the plaint for grant of mesne profits at the rate of Rs.11,500/- is totally misconceived and the same cannot be granted. The learned Counsel for the 1st to 3rd Defendants submitted that the said Defendants were not served with notice dated 3rd August 1984.

19. I carefully considered the submissions made by the learned Counsel appearing for the parties. I have also perused the various decisions relied upon by the learned Counsel for the 1st to 3rd Defendants. I have

perused the pleadings and notes of evidence.

20. It will be necessary to refer to the terms of the suit agreement. The suit agreement has been admitted in evidence and marked as Exhibit P-2. Clause 5 of the said agreement records that the balance consideration of Rs.4,69,500/- was to be paid on or before 1st December 1984 and the time shall be the essence of the contract. The agreement also records that the Plaintiffs agreed to hand over the possession of the suit premises to the purchasers under the said agreement on execution of the suit agreement. It must be stated here that there is no dispute between the parties that the 1st to 3rd Defendants were put in possession of the suit premises under the suit agreement. Clause 6 of the agreement provides that if the balance consideration is not paid by the 1st to 3rd Defendants on or before 1st December 1984, the suit agreement shall stand cancelled and the 1st to 3rd Defendants will have to hand over vacant and peaceful possession of the suit premises to the Plaintiffs. In such a case, the Plaintiffs will be liable to refund sum of Rs.48,000/- being the earnest money.

21. Clause 8 of the suit agreement records that pending the payment of balance consideration amount by the 1st to 3rd Defendants, they will pay to the

Plaintiffs a sum of Rs.4,000/- per month regularly on or before 10th day of each month in advance commencing from 1st December 1979. Clause 11 provides that in the event of the purchasers committing default in payment of any two instalments of interest of Rs.4,000/- per month, then the vendors shall be entitled to terminate the suit agreement after giving 60 days notice in writing to the purchasers under the said agreement. It is provided that in such event, the purchasers will have to hand over possession of the suit premises to the Plaintiffs. In paragraph 11 of the Written Statement of the 1st to 3rd Defendants, they have admitted that payment of sum of Rs.4,000/- per month was not made by them from June 1983. The said Defendants have set out reasons why they had to stop payment from June 1983.

22. The office copy of notice dated 3rd August 1984 has been admitted in evidence and marked as Exhibit P-3. In the said notice it is alleged that the monthly payment at the rate of Rs.4,000/- per month has been made by the 1st to 3rd Defendants only till May 1983 and thereafter, inspite of repeated requests and reminders by the Plaintiffs, the said Defendants have failed and neglected to pay the amount. It is alleged that the 1st to 3rd Defendants have not paid outgoings in respect of the suit premises from 1st December 1979 to 31st July 1984. By

the said notice, the Plaintiffs purported to terminate the suit agreement and forfeit the earnest money or deposit of Rs.48,000/-. The said notice has been addressed to the 2nd and 3rd Defendants. The Plaintiffs have also placed on record the postal envelopes by which the notice was sent by R.P.A.D. to the 2nd and 3rd Defendants. The postal envelopes have been returned with a remark "unclaimed". The Plaintiffs have also placed on record the certificate of posting of the said notice to the 2nd and 3rd Defendants. The said certificate has been admitted as evidence and marked as Exhibit P-4.

23. In the affidavit in lieu of examination in chief of the 2nd Defendant, he has not stated anything about the service of notice dated 3rd August 1984. The 2nd Defendant has not stated that the notice was neither tendered to him nor received by him. In paragraph 8 of the plaint the Plaintiffs have referred to and relied upon notice dated 3rd August 1984. In the affidavit in lieu of examination in chief of the 1st Plaintiff, he has referred to and relied upon the said notice. If it was the case of the 1st to 3rd Defendants that they were not served with the said notice, the 2nd Defendant in his affidavit in lieu of examination in chief ought to have specifically come out with the case that the notice was neither received nor any intimation tendered to the 2nd or 3rd

Defendants by the postal authorities. In the examination in chief of the 1st Plaintiff he has stated that the notice was sent by R.P.A.D. as well as Under Posting Certificate and he was producing the envelopes returned with the endorsement "unclaimed" and he was also producing certificate of posting of notice to the 2nd and 3rd Defendants. Therefore, the presumption under Section 114 of the Evidence Act, 1872 will have to be invoked and it will have to be presumed that the notice was served to the 2nd and 3rd Defendants. The 2nd and 3rd Defendants are the partners of the 1st Defendant - Firm.

24. As per the terms of the suit agreement and in particular clause 8 thereof, the 1st to 3rd Defendants were liable to pay to the Plaintiffs a sum of Rs.4,000/- by way of compensation regularly on or before 10th day of each month in advance commencing from 1st December 1979. On a conjoint reading of clauses 5 and 8 of the suit agreement it is obvious that the 1st to 3rd Defendants were liable to pay a sum of Rs.4,000/- per month to the Plaintiffs till the payment of balance consideration of Rs.4,69,5000/-, in accordance with clause 5 of the said agreement on or before 1st December 1984. Clause 11 of the suit agreement empowers the Plaintiffs to terminate the said agreement in case the 1st to 3rd Defendants committed default in payment of any two instalments of

Rs.4,000/- per month. However, the said clause requires 60 days notice in writing to be given of termination to the 1st to 3rd Defendants. As pointed out earlier, admittedly from June 1983, the 1st to 3rd Defendants did not pay the agreed balance amount of Rs.4,000/-. Thus, as on 3rd August 1984, there was already a default from June 1983 onwards. The notice also refers to the fact that the Court Receiver has been appointed by this Court in the proceedings filed by the 5th and 6th Defendants. There is also an allegation made that the 1st to 3rd Defendants have failed to pay the monthly outgoings in respect of the suit premises. Clause 10 of the suit agreement provides that till the entire consideration was paid by the 1st to 3rd Defendants, the 1st to 3rd Defendants were liable to pay Municipal Taxes, maintenance charges and all other outgoings payable in respect of the suit premises to the Society. It is stated in the notice that the 1st to 3rd Defendants were in arrears of outgoings for the period between 1st December 1979 to 31st July 1984 in the sum of Rs.78,596.65p. The termination of the suit agreement is not only on the ground of non-payment of sum of Rs.4,000/- per month but also on the ground of non-compliance with the obligations of the 1st to 3rd Defendants under Clause 10 of the suit agreement. If the termination was only on the basis of Clause 11 of the suit agreement, notice of termination of 60 days

was required to be given. However, as stated earlier, the termination made by the Plaintiffs is also on the other ground. The breach committed by the 1st to 3rd Defendants of obligations under Clause 10 of the suit agreement apart from breach relating to payment of sum of Rs.4,000/- per month has been established. There is nothing placed on record to show that outgoings were paid by the 1st to 3rd Defendants for the period between 1st December 1979 to 31st July 1984. The service of notice is also established as held earlier. Once it is held that the termination of the suit agreement is lawful, in normal course the Plaintiffs who are admittedly the owners of the suit premises will be entitled to decree for possession.

25. However, in the present case the main contention of the 1st to 3rd Defendants is that their possession will have to be protected in view of Section 53-A of the said Act of 1882. The learned Counsel appearing for the 1st Defendant has placed reliance on the decision of the Apex Court in the case of Nathulal V/s. Phoolchand (AIR 1970 S.C. Page 546). In paragraph 9 of the decision the Apex Court has laid down the conditions necessary for making out the defence under Section 53-A of the said Act of 1882. The relevant part of paragraph 9 reads thus :-

"9. The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract."

26. The Apex Court held that if the aforesaid conditions are fulfilled, the transferor or any person claiming under him is debarred from enforcing against

the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the Contract. In so far as condition nos.1 and 2 of the aforesaid conditions are concerned, there is hardly any dispute that the 1st to 3rd Defendants have fulfilled the said conditions. In so far as condition no.3 is concerned, it can be said that the 1st to 3rd Defendants had done some acts in furtherance of the contract. The said Defendants have admittedly paid the earnest money and they have paid a sum of Rs.4,000/- per month to the Plaintiffs till May 1983. Therefore, the only material question to be decided on this aspect is whether the 4th condition laid down by the Apex Court has been fulfilled by the 1st to 3rd Defendants.

27. It will be necessary to refer a decision of the Apex Court in the case of Mohan Lal (deceased) through his Legal Representative Kachru and Ors. V/s. Mira Abdul Gafaar & Anr. (AIR 1996 S.C. page 910). The Apex Court was dealing with the defence under Section 53-A of the said Act of 1882. The Apex Court was dealing with the case where the suit by the purchasers of specific performance of an agreement for sale of immovable property was dismissed and the dismissal of the said suit had attained finality. Thereafter, the vendor filed the suit for possession.

One of the plea raised by the purchaser was under Section 53-A of the said Act of 1882. The Trial Court decreed the suit for possession. The said decree was upset by the Appellate Court. However, the High Court restored the decree for possession. The original Defendant purchaser approached the Apex Court by preferring a Special Leave Petition. In paragraph 6 of the said decision, the Apex Court has held thus :-

> "6. Even otherwise, in a suit for possession filed by the Respondent, successor-in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act, 1963, the Plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The

> plaintiff who seeks enforcement of the agreement is enjoined to establish the same. **Equally, when transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder."**
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> **(Emphasis added)**

28. The Apex Court held that under Section 16-C of the Specific Relief Act, 1963, in a suit for specific performance, the Plaintiff must plead and prove his readiness and willingness from the date of the contract till the date of the decree. The Apex Court further observed that equally when a transferee seeks to avail of Section 53-A to retain possession of the property which he had taken under the contract, it would be also incumbent upon the transferee to plead and prove his readiness and willingness to perform his

part of the contract. In the present case the 1st to 3rd Defendants will have to plead and prove their readiness and willingness to perform their part of the contract. In the light of the law laid down by the Apex Court, the case made out by the 1st to 3rd Defendants will have to be examined. In paragraph 5 of the written statement, the said Defendants have stated that they were always ready and willing to carry out their part of the obligations under the suit agreement. In paragraph 11 of the written statement, the said Defendants had reiterated the aforesaid statement and it is stated that even now they are ready and willing to carry out their part of the obligations under the agreement. The obligations under the agreement were : (1) To pay the balance consideration of Rs.4,69,500/- on or before 1st December 1984; (2) To pay Rs.4,000/- per month on or before 10th day of every month in advance till 1st December 1979 or till the date of payment of balance consideration and (3) To keep on paying the property tax, maintenance charges and outgoings in respect of the suit premises till the payment of the entire balance consideration.

29. In so far as payment of sum of Rs.4,000/- is concerned, the specific case of the said Defendants in the written statement is that they had stopped making payment of sum of Rs.4,000/- from June 1983. The

reason given is that though they were ready and willing to pay the balance consideration, the Plaintiffs insisted that instead of paying the balance consideration, the said Defendants should continue to pay the sum of Rs.4,000/- per month.

30. It is necessary to see whether the said contention regarding readiness and willingness of the 1st to 3rd Defendants to pay the balance consideration is established. It will be also necessary to see whether the alleged insistence of the Plaintiffs that the said Defendants should continue to pay Rs.4000/- per month instead of paying balance consideration is established. In the written statement it is not stated that on any particular day or in any particular month the 1st to 3rd Defendants offered to pay the balance consideration to the Plaintiffs. It is pertinent to note that in the cross examination of the 1st Plaintiff, no such suggestion has been given by the Advocate for the 1st to 3rd Defendants. In fact, the case made out by the 1st to 3rd Defendants in paragraph 11 of the written statement regarding their readiness and willingness to pay balance consideration and regarding the insistence of the Plaintiffs that the said Defendants should continue to pay Rs.4,000/- per month has not even been put to the 1st Plaintiff. In fact, there is no cross examination on the said aspect. Perusal of the affidavit in lieu of

examination-in-chief of the 2nd Defendant shows that the same is devoid of any particulars. It is not stated that at any point of time the said Defendants offered to pay the balance consideration to the Plaintiffs and the Plaintiffs did not accept the same by insisting that the said Defendants should continue to pay Rs.4,000/- per month. It must be noted here that it is not the case made out by the 1st to 3rd Defendants that any communication in writing was made by them to the Plaintiffs or any of them offering them the balance consideration. In the written statement it is stated that due to various proceedings against the said Defendants they could not make any correspondence. However, no such assertion has been specifically made in the affidavit in lieu of the examination in chief of the 2nd Defendant. Perusal of the affidavit shows that it is not even stated that the Plaintiffs were not willing to accept the balance consideration though offered to them and that the Plaintiffs insisted on the 1st to 3rd Defendants paying the sum of Rs.4,000/- per month. Thus, the said specific defence which was raised in paragraph 11 of the written statement has not been even adverted to in the affidavit in lieu of the evidence of the 2nd Defendant. Therefore, the contention raised that the Plaintiffs insisted on the said Defendants paying the sum of Rs.4,000/- per month cannot be accepted. The said Defendants have relied upon paragraph 7 of the

said affidavit in lieu of evidence of the 2nd Defendant by pointing out that there is no cross examination on what is stated in paragraph 7. The relevant portion of paragraph 7 reads thus :-

> "7. I say that in the year 1983 I as also the Defendant No.3 lost track of the Plaintiffs who were not traceable and could not be contacted. I say that then I in furtherance of performing our obligations under the said Agreement dated 26th November 1979 made numerous attempts to trace the Plaintiffs, but was unsuccessful in all my attempts to reach/communicate with the Plaintiffs and was thus prevented from performing the obligations under the said Agreement dated 26th November, 1979 in spite of being ready and willing to do so."

31. It must be stated here that the aforesaid case is not at all made out by the said Defendants in their written statement and therefore, the said Defendants could not have come out with an altogether new case in the evidence which is not even pleaded. Even according to the case of the 1st to 3rd Defendants, they paid the sum of Rs.4,000/- per month to the Plaintiffs till May 1983. Even assuming that the said Defendants were entitled to stop payment of Rs.4,000/-

per month, in the evidence no particulars of the alleged efforts made by the said Defendants to contact the Plaintiffs have been set out. Only a bald statement has been made that in the year 1983, the Plaintiffs were not traceable and could not be contacted. A statement has been made that the 2nd Defendant made numerous attempt to meet the Plaintiffs but was unsuccessful. No particulars of the alleged numerous attempts have been set out in the evidence. There is no explanation as to why the notice dated 3rd August 1984 was not replied to. There is no explanation as to why what is stated in paragraph 7 of the affidavit is not specifically pleaded by way of defence in the written statement. Therefore, the failure of the Plaintiffs to cross examine the 2nd Defendant on what is stated in paragraph 7 of the affidavit is not at all significant.

32. There is one more aspect of the matter. Even assuming that what is set out by the 1st Defendant in paragraph 11 of the written statement is true, as per the stipulations in the suit agreement, the 1st to 3rd Defendants could not be stopped paying the sum of Rs.4,000/- per month till the payment of the balance consideration. The said Defendant stopped paying the sum of Rs.4,000/- from June 1983. Under the suit agreement, the said Defendants ought to have paid sum of Rs.4,000/- per month till the payment of the

balance consideration. Even assuming that the Plaintiffs were not interested in receiving the balance consideration, the 1st and 2nd Defendants were liable to pay the amount per month atleast till the end of November 1984 as the time to pay the balance consideration was provided upto 1st December 1984. There is also no explanation as to why taxes and outgoings required to be paid by Clause 10 of the said agreement were not paid by the said Defendants. Thus, it is very clear that the 1st to 3rd Defendants have not proved their readiness and willingness to comply with Clauses 6, 8 and 10 of the suit agreement. Admittedly, there is no communication made in writing by the 1st to 3rd Defendants till 1st December 1984 or even thereafter showing their readiness and willingness to pay the balance consideration of Rs.4,69,500/-.

33. It will be necessary to refer to certain orders passed by this Court during the pendency of the suit. The order dated 5th December 1997 passed by the learned Single Judge of this Court records that the 1st to 3rd Defendants have not paid the dues of the Society. By the said order, the said Defendants were directed to comply with the same on or before 10th December 1997. There is one more order passed on 21st October 1998. In the said order it is recorded that the learned Counsel for the 2nd and 3rd Defendants

stated that their liability was not more than Rs.2,30,000/- and after payment of the sum of Rs.1,00,000/- by a pay order, only a sum of Rs.1,30,000/- was payable by the 2nd and 3rd Defendants. Therefore, this Court directed them to pay a sum of Rs.1,30,000/- to the Court Receiver. Even the order dated 22nd June 1999 passed in Notice of Motion No.1585 of 1998 takes a note of the fact that the 1st to 3rd Defendants were in arrears. The said conduct of the 1st to 3rd Defendants as reflected in the aforesaid orders indicates that there was a persistent default on the part of the said Defendants in paying the outgoings in respect of the suit premises. As held by the Apex Court in the case of **Mohan Lal** (Supra), it was for the 1st to 3rd Defendants not only to plead but to prove their readiness and willingness to perform their part of the contract. The obvious conclusion is that the said Defendants have failed to prove their readiness and willingness to perform their part of the contract.

34. As pointed out earlier, the learned Counsel appearing for the 1st Defendant has relied upon several decisions. She has placed reliance on a decision of the Orissa High Court in the case of **Kainta Meherani V/s. Danry Neger** & Ors. (AIR 1964 Orissa Page 94) and **Ekadashi V/s. Ganga** and Ors. (AIR 1981 Allahabad Page 373). She has also relied

upon a decision of Madhya Pradesh High Court in the case of **Devisahai Premraj Mahajan V/s. Govindrao Bajwantrao** & Ors. (AIR 1965 M.P. page 275). She has also placed reliance on the decision of erstwhile Nagpur High Court in the case of **Amroo and Ors. V/s. Babarao** (AIR 1951, Nagpur Bench Page 403). She relied upon a decision of the Privy Council in the case of **Prabodh Kumar Das and Ors. V/s. Dantmara Tea Co. Ltd.** and Ors. (AIR 1940 P.C. Page 1). As stated earlier, the first 3 conditions stipulated by the Apex Court for applicability of Section 53-A of the said Act of 1882 are fulfilled by the 1st to 3rd Defendants. However, the said Defendants have failed to prove their readiness and willingness. Therefore, the aforesaid decisions may not be of any help to the said Defendants.

35. The decision of the Apex Court in the case of **Sardar Govindrao Mahadik and Anr. V/s. Devi Sahai** and Ors. (AIR 1982 S.C. page 989) also refers to conditions precedent for applicability of Section 53-A of the said Act of 1882. The other decision of the Supreme Court in the case of **Jawahar Lal Wadhwa & Anr. V/s. Haripada Chakroberty** (AIR 1989 S.C. page 606) deals with the principle of part performance incorporated under Section 53-A of the said Act of 1882. The Apex Court observed that once a party to a contract has repudiated the contact, it is not

necessary for the other party to tender the other amount payable under the contract in the manner provided in the contract in order to successfully claim the specific performance of the contract. The Apex Court, in the facts of the case observed that under the agreement for sale the transferee was put in possession and she was required to pay monthly instalments to the transferor. After paying the some of instalments, the transferee stopped paying the amount on the ground that a transferor had repudiated the agreement. The case before the Apex Court under the Arbitrator had held that since the transferee stopped paying monthly sum, he could not be said to have performed or was willing to perform his part of the contract and therefore, he was not entitled to benefit of Section 53-A. The Apex Court upheld the view taken by the learned Arbitrator. In the present case, the notice of termination of the contract was issued by the Plaintiff on 3rd August 1984. However, the 1st to 3rd Defendants stopped payment of monthly amount from June 1983 onwards. The failure to pay the monthly amounts from June 1983 onwards militates against the readiness and willingness of the said Defendants to perform their obligations under the suit agreement. In the present case there have been defaults on the part of the 1st to 3rd Defendants in even in payment of outgoings even before the contract was terminated on 3rd August 1984. Therefore, the

plea of part performance based on Section 53-A cannot be accepted. Hence, the possession of the 1st to 3rd Defendants cannot be protected.

36. It must be stated here that neither the 5th Defendant nor 6th Defendant have come forward to lead any evidence for establishing alleged mortgage in their favour. There is no cross examination made by the said Defendants on the aspect of alleged mortgage created by the 1st to 3rd Defendants in their favour. The Issue No.21 was framed on the basis of the contentions raised by the 5th and 6th Defendants regarding validity of equitable mortgage. The said Defendants have not discharged burden on them and therefore, the alleged mortgage allegedly created by the 1st to 3rd Defendants has not at all been established.

37. In so far as Issue No.1 is concerned, I have already recorded a finding in favour of the Plaintiffs. In so far as Issue No.2 is concerned, the 4th Defendant was appointed as a Court Receiver of the suit premises by an order passed during the pendency of this suit and therefore, it is not necessary to answer the second issue. As the 5th and 6th Defendants have failed to establish execution of any mortgage, the Issue No.3 has become redundant. The Issue No.4 stands answered by the findings which are

already recorded. In so far as Issue No.5 is concerned, the same is on the right of the Plaintiffs to forfeit the earnest money of Rs.48,000/-. The Clauses 6 and 11 of the suit agreement provide for termination of the suit agreement under certain contingencies. Both the Clauses provide that after termination of the suit agreement, the 1st to 3rd Defendants shall be liable to hand over vacant and peaceful possession of the suit premises to the Plaintiff and in such event the Plaintiff shall refund the earnest money of Rs.48,000/-. However, the 1st to 3rd Defendants have failed to hand over the vacant and peaceful possession of the suit premises to the Plaintiffs and the Plaintiffs were driven to file a suit in this Court. Moreover, as stated earlier, the termination is also on the ground of default by the 1st to 3rd Defendants in payment of outgoings. Therefore, Issue No.5 will have to be answered in the affirmative.

38. In so far as Issue No.6 is concerned, as a consequence of failure of the 1st to 3rd Defendants to establish the plea under Section 53-A of the said Act of 1882, the Plaintiffs are entitled to recover the possession of the suit premises. In so far as Issue No.7 recording indemnity by the 1st to 3rd Defendants is concerned, in view of the decree which I propose to pass, no indemnity is required to be given by the 1st

to 3rd Defendant.

39. In so far as Issue No.8 is concerned, the prayer in the suit is for directing payment of compensation/mesne profit at the rate of 11,500/- per month. No evidence has been led by the Plaintiffs to justify the grant of compensation/mesne profit at the said rate. An enquiry will have to be held as required by Rule 12 of Order XX of the Code of Civil Procedure, 1908 for determination of the mesne profit.

40. The Issue No.9 is on bar of limitation. It is not in dispute that the Plaintiffs are the owners of the suit premises and the suit is based on title. The suit is covered by Article 65 of the Limitation Act, 1963 and the limitation for filing the suit for possession will be 12 years from the date on which the possession of the Defendants became adverse to the Plaintiffs. However, plea of adverse possession has not been raised by the contesting Defendants and hence, the suit will have to be held as filed within limitation.

41. Issue Nos. 10 and 11 are on the basis of plea of non-joinder of the parties. It is not established that the Plaintiffs have failed to impleade necessary or proper parties. Hence, the said issue will have to be answered against the Defendants.

42. Issue Nos.12 and 13 are based on the failure of the Plaintiffs to serve the notice under Section 80 of the Code of Civil Procedure, 1908. On plain reading of the averments made in the plaint, the said issues will have to be answered in favour of the Plaintiffs. In so far as Issue No.14 is concerned, I have already recorded a finding that the 1st to 3rd Defendants have failed to prove that the Plaintiffs insisted that the balance consideration need not be paid but the 1st to 3rd Defendants should go on paying a sum of Rs.4,000/- per month.

43. As the 6th Defendant has not led any evidence, Issue No.15 will have to be answered in favour of the Plaintiffs. Issue No.16 will have to be also answered in favour of the Plaintiffs as the 6th Defendant has not led any evidence either documentary or oral to prove that any mortgage or charge was validly created by the 1st to 3rd Defendants in respect of the suit premises.

44. Issue No.17 will have to be answered in favour of the Plaintiffs as the Plaintiffs have established their right to recover their possession of the suit premises. Moreover, Defendant No.6 has not led any evidence to establish any right, title or in respect of the suit premises.

45. In so far as Issue Nos.18 and 19 are concerned, I have already recorded a finding on the said issues against the 1st to 3rd Defendants. Same is the case with Issue No.20 and the said issue will have to be answered in favour of the Plaintiffs.

46. For the reasons which are already recorded, the Issue No.21 will have to be answered against the 5th and 6th Defendants. None of the Defendant Nos.1 to 3 and 5 to 7 have established any right, title or interest in respect of the suit premises.

47. Now, coming to the prayers made by the Plaintiffs in the plaint, prayer (b) is regarding declaration regarding purported equitable mortgage allegedly created by the 1st to 3rd Defendants. The said prayer deserves to be granted. In so far as prayer (a) is concerned, in view of grant of (b), the same need not be granted. It is also not necessary to grant prayer (c). In view of the findings which are already recorded, the prayer (d) will have to be granted. However, alternative prayer made in clause (d) need not be granted. Prayer (e) also deserves to be granted. In so far as prayer (f) is concerned, Plaintiff is entitled to recover the sum of Rs.4,000/- per month from the 1st June 1983 to 31st July 1984. However, interest at the rate of 18% per annum from

1st August 1984 cannot be granted and on the amount of Rs.56,000/-, interest will be payable at the rate of 6% per annum from the date of the institution of the suit till the date of payment or realisation.

48. In so far as prayer clause (g) is concerned, the 1st to 3rd Defendants have already paid requisite amount to the Receiver and therefore, the said prayer cannot be granted. Prayer (h) cannot be granted. In so far as prayer (i) is concerned, no evidence has been led for determination of the quantum of compensation/mesne profits and therefore, an enquiry will have to be held as contemplated by Rule 12 of Order XX of the Code of Civil Procedure, 1908.

49. To enable the Plaintiffs to take appropriate steps for executing the decree, the appointment of the Court Receiver made by this Court will have to be continued for a reasonable time.

50. Hence, I pass following order :-

(a) The suit is decreed in terms of prayer clauses (b), (d) and (e).

(b) The 1st to 3rd Defendants are ordered and decreed to pay a sum of Rs.56,000/- to the Plaintiffs being arrears of compensation from

the period from 1st June 1983 till 31st July 1984 at the rate of Rs. 4,000/- per month together with interest thereon at the rate of 6% per annum from the date of institution of the suit till payment or realisation.

(c) There shall be an inquiry held as contemplated by rule 12 of order XX of the Code of Civil Procedure, 1908 for determination of the mense profit payable by the 1st to 3rd Defendants.

(d) Rests of the prayers are not granted.

(e) The interim order passed by this Court on 22nd June 1999 in Notice of Motion No.1585 of 1988 will continue to operate for a period of six months to enable the Plaintiffs to take appropriate steps by filing execution proceedings.

(f) The 1st to 3rd Defendants will pay proportionate costs of the suit to the Plaintiffs. There will be no order of costs in so far as other Defendants are concerned.

(g) On the prayer made by the learned Counsel appearing for the 1st to 3rd Defendants, the decree shall not be executed till 31st December 2007.

JUDGE